North Dakota Law Review

Volume 75 | Number 4 Article 2

1999

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PROSECUTION OF NON-INDIANS FOR NON-SERIOUS OFFENSES COMMITTED AGAINST INDIANS IN INDIAN COUNTRY

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I. INTRODUCTION

The federal government has exclusive authority to prosecute crimes committed on Indian lands by non-Indians against Indians.[1] Thus, when the perpetrator is non-Indian, Indian tribes and their separate members are entirely dependent on the federal government for the benefits of meaningful law enforcement that other Americans receive from state and local governments.[2] Unfortunately, the federal government does not take its responsibilities as seriously as it should, with the result that Indians may often be easy prey for non-Indian criminals, who may target reservation lands for this very reason.[3] This lax enforcement is particularly pronounced in the area of non-serious offenses, on which the federal government is less inclined to expend its resources.[4]

This Article explores both the source of this problem and its implications, as well as potential solutions. Part II reviews the background of the issue, including the statutory basis of the government's power, the scope of its obligations, and the scope of the problem. Part III explores the constitutional implications of this problem. Finally, Part IV suggests some potential modifications to the current approach.

II. BACKGROUND

The following section addresses the background of the issue, beginning with an explanation of the basis of the federal government's power over non-Indian-on-Indian crime committed in Indian territory.

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1. *See infra* notes 13-19 and accompanying text.

2. *See, e.g.*, Duro v. Reina, 495 U.S. 676, 684 (1990) ("[T]he inherent sovereignty of the Indian tribes does not extend to criminal jurisdiction over non-Indians who commit crimes on the reservation").

3. *See* Geoffrey C. Heisey, *Oliphant and Tribal Criminal Jurisdiction Over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction*, 73 IND. L.J. 1051, 1055 (1998) (stating that the inability of tribes to prosecute non-Indian offenders "encourages lawlessness by non-Indians while they are in Indian country").

4. *See id.* at 1054 (noting the federal government's hesitancy to prosecute minor crimes).

A. THE SOURCE OF FEDERAL POWER OVER NON-INDIAN CRIME IN INDIAN TERRITORY

Congress passed the General Crimes Act, 18 U.S.C. § 1152 (hereinafter "§ 1152") in 1817.[5] The purpose of the Act was to permit punishment of all crimes committed by non-Indians in Indian territory.[6] Presently, the statute reads as follows:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[7]

The Act thus imported into Indian country the entire body of criminal law applicable to enclaves, such as national parks and military installations.[8] Initially, this body of law was comprised of a scattered collection of federal statutes that allowed punishment of individual crimes.[9] This piecemeal legislation, therefore, represented only portions of a complete criminal code, and in response, Congress in 1825 passed the Assimilative Crimes Act, codified at 18 U.S.C. § 13, which reads in part:

> Whoever within or upon any [federal enclave] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.[10]

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5. 18 U.S.C. § 1152 (1994).
6. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 144-45 (3d ed. 1998).
7. 18 U.S.C. § 1152.
8. *See* CANBY, *supra* note 6, at 145; *see also* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW, CASES AND MATERIALS 279 (3d ed. 1991).
9. CANBY, *supra* note 6, at 146.
10. 18 U.S.C. § 13 (1994).

This provision had the effect of making state criminal law applicable to any offense, not otherwise specifically addressed by a separate federal statute, when committed on a federal enclave.[11] Section 13, which applies to all federal enclaves, was therefore automatically applicable to Indian lands by virtue of § 1152.[12]

Taken together, §§ 1152 and 13 have been interpreted as giving the federal government exclusive jurisdiction to prosecute offenses committed on Indian lands when the defendant is non-Indian and the offense is committed against either Indians or Indian interests.[13] Thus, in *United States v. McBratney*[14] and *Draper v. United States*,[15] the Supreme Court held that while the states have exclusive jurisdiction over crimes by non-Indians against non-Indians, the federal government retains jurisdiction when the crimes are against either Indians or Indian property.[16] In *Donnelly v. United States*,[17] the Court further emphasized that although states have exclusive jurisdiction for "white on white" crime, the federal government retains sole jurisdiction where an Indian is victimized by "whites and others not of Indian blood."[18]

Therefore, only the federal government may prosecute crimes committed by non-Indians against Indians in Indian territory.[19] As the following discussion shows, however, having the power to prosecute such offenses does not mean the government has the obligation to do so.

B. THE SOURCE OF THE FEDERAL GOVERNMENT'S OBLIGATIONS TO PROTECT INDIANS AGAINST NON-INDIAN CRIME

From the beginning, all the "discoverers" of the North American Continent saw American Indians as something barely, if not less than, human. As the world has come to understand, this was, and largely remains, characteristic of the Anglo and Western European view of persons who are something other than white.[20] This self-perceived

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11. CANBY, *supra* note 6, at 147.

12. *See* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 532-33 (1976) (stating that the Assimilative Crimes Act applies in Indian country).

13. CANBY, *supra* note 6, at 148; *see also* Clinton, *supra* note 12, at 523-24 (stating that the prevailing rule is that federal jurisdiction under § 1152 is exclusive).

14. 104 U.S. 621 (1881).

15. 164 U.S. 240 (1896).

16. *See generally* Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1881).

17. 228 U.S. 243 (1913).

18. Donnelly v. United States, 228 U.S. 243, 271-72 (1913).

19. *See* Clinton, *supra* note 12, at 523 n.94 (stating that "the federal jurisdiction conferred by sections 1152 and 1153 is exclusive; where one of these sections applies, the state has no jurisdiction").

20. *See* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT–THE DISCOURSES OF CONQUEST 8 (1990) (describing the theory behind colonial expansion to be that "the West's religion, civilization, and knowledge are superior to the religions, civilizations, and knowledge of

superiority was prevalent wherever Anglos and Western Europeans settled. This perception, and blasphemous invocations of expansionism in the name of Christianity, were recurrent justifications for the domination of "aborigines" everywhere, including the North American Indians.[21]

Thus, the governments of the various European colonies, confederated states, and United States decimated the various tribes without hesitation. In the name of God and manifest destiny, Indians were subjected to the worst imaginable horrors as the target of genocidal extermination, both literally and culturally.[22] As is often the case with issues of moral implication, courts of law merely rubber-stamped the will of the majority, which soon internalized the notion that the Indian was of no significance in the great scheme of things, particularly the white man's scheme of things. The judiciary, being a branch of the same government that authorized and encouraged subjugation of the Indian, merely had the task of imputing legitimacy, or at least the appearance thereof, into this great scheme.

In the 1823 Supreme Court case of *Johnson v. M'Intosh*,[23] Chief Justice Marshall held that upon the "discovery" of North America, the continent was free for the taking by the various European countries, whose title thereto was established merely by taking possession.[24] Moreover, once title was established by possession, it was a right to be respected by all other European nations and with which no other European nation could interfere.[25] The Indians were "admitted to be the rightful occupants of the soil," but, even here, "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[26] Further, while the claims of the European countries may "have been maintained and established . . . by the sword," such methods found "some excuse, if not justification, in the character and habits of the [Indians] whose rights [were] wrested from them."[27]

Having committed itself to these views, it was not surprising that, after Congress passed legislation authorizing confiscation of Indian

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non-Western peoples").

21. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 576-78 (1823) (discussing England's 15th, 16th, and 17th century discovery commissions, which limited themselves to discovery and possession of lands "then unknown to Christian people" or "remote, heathen and barbarous lands as were not actually possessed by any Christian prince or people").

22. CLINTON ET AL., *supra* note 8, at 8; *see also* B.J. Jones, *In Their Native Lands: The Legal Status of American Indian Children in North Dakota*, 75 N.D. L. REV. 241, 247-48 (1999) (describing how federal authorities used Indian children as the "agents of change" to assimilate Indians into white American culture).

23. 21 U.S. (8 Wheat.) 543 (1823).

24. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

25. *Id.*

26. *Id.* at 574.

27. *Id.* at 588-89.

lands and removal of Indians from within state boundaries to western located reservations, the Supreme Court also found, in the 1831 case of *Cherokee Nation v. Georgia,*[28] that the Cherokee nation did not have standing to challenge such removal.[29] The Cherokee nation, in seeking injunctive relief to prevent Georgia's annexation of Cherokee lands, had invoked the original jurisdiction of the Court under Article Three, Section Two of the Constitution, which allows the Court to hear controversies "between a state or citizens thereof, and foreign states, citizens or subjects."[30]

In deciding that the Cherokee Nation did not qualify as a "foreign state," Chief Justice Marshall did not precisely identify the political status of Indians.[31] Rather, after stating that "[t]he condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence,"[32] he merely elaborated upon "federal trusteeship" notions introduced in *M'Intosh*, the core of which is that the various tribes are subjugated to the interests of the United States, meaning that whatever the political status of the tribes is labeled, their existence is entirely at the sufferance of the United States.[33] Consequently, while *Cherokee Nation* may have suggested that the tribes "look to [the federal] government for protection; rely upon its kindness and its power; [and] appeal to it for relief to their wants,"[34] nothing in that case required the federal government to extend these benefits to Indians.[35] If anything, *Cherokee Nation* merely gave the green light for the states, pursuant to federal authority, to weaken the ability of the tribes to protect and provide for themselves.[36]

In the wake of *Cherokee Nation* and Congress' legislative recognition of relocation of Indians as national policy, the states freely enacted legislation which either relocated the tribes, curtailed their political growth, or both. While doing so, it was common for the states, which desired to establish sovereignty within their borders, to project the jurisdiction of their own courts into tribal lands and simultaneously invalidate whatever system the Indians might have had in place for trying and punishing crimes committed on the reservation.[37]

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28. 30 U.S. (5 Pet.) 1 (1831).
29. *See generally* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
30. *Id.* at 15.
31. *See id.* at 15-20.
32. *Id.* at 16.
33. *Id.* at 17.
34. *Id.*
35. *See id.*
36. *See id.*
37. *See generally* CLINTON ET AL., *supra* note 8, at 11-18.

The next major developments in this area were in the 1978 United States Supreme Court case *Oliphant v. Suquamish Indian Tribe*.[38] In *Oliphant*, the Court made it absolutely clear that tribal courts have no jurisdiction over non-Indian defendants.[39] In arriving at this conclusion, the Court basically reiterated precedent to the effect that Indians occupy reservations with the assent of the United States and that reservations are within the territorial sovereignty of the United States.[40] This was essentially the same message announced in *M'Intosh* and Cherokee Nation, that whatever rights and privileges tribes enjoy are at the sufferance of the United States.[41] Just as with these early cases, *Oliphant* dealt only with limitations on tribal power; nowhere did it command the federal government to extend protections, privileges or rights of any sort to the tribes, either by virtue of a federal trusteeship or any other theory.[42] It only recognized an obligation to protect the tribes when such an agreement existed in a presently enforceable treaty, which, of course, can be abrogated by the will of Congress.[43]

Considering precedent, there is but one available conclusion regarding the legal obligation of the federal government to protect the tribes: There is no such obligation.[44] Consequently, irrespective of the fact that the right and power to prosecute is reserved exclusively to the federal government through § 1152, and possibly the federal trusteeship theory, there is nonetheless no duty or obligation of the federal government to prosecute non-Indian defendants who commit crimes on Indian lands.[45] The implications of this lack of obligation are explored in the following section.

C. SCOPE OF THE PROBLEM

The significance of the federal government's failure to prosecute non-serious offenses committed on Indian lands by non-Indians against Indians is common knowledge amongst authors and commentators. The following summary is illustrative:

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38. 435 U.S. 191 (1978).

39. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

40. *See generally id.*

41. *See generally id*; *see generally* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

42. *See generally Oliphant*, 435 U.S. at 191.

43. *See id.* at 210 (stating that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress").

44. *See supra* notes 36-40 and accompanying text.

45. *See supra* notes 36-40 and accompanying text.

> Unfortunately, the federal system is not geared towards prosecution of non-major crimes, most of which are misdemeanors. Funds for prosecution of federal crimes are finite, requiring busy prosecutors to allocate their resources as best they can. As a result, crimes like assaults and [thefts] are simply not prosecuted, which creates grave problems for tribes attempting to police their reservation without the power to exercise criminal jurisdiction over non-Indians. Moreover, the distance between the federal courts and reservations can add to the problem. For example, the nearest federal courts and prosecutors to the Fort Peck Reservation in Montana are Billings and Great Falls, over 250 miles from the reservation. Several bills designed to increase the number of federal prosecutors and place federal magistrates in Indian country have been unsuccessful, partly because of Indian opposition to the addition of another layer of federal law enforcement in Indian country in place of a solution that would strengthen tribal authority. See S. 2832, 96th Cong., 2d Sess. (1980); S. 1177, 99th Cong., 2d Sess. (1986).[46]

Similarly, a former tribal special prosecutor had the following to say:

> [N]on serious crimes by a non Indian against an Indian was not really dealt with by federal prosecution. These federal misdemeanors have always been the "problem area" of the law. The State and the Tribes would not touch this issue, for lack of jurisdiction.
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> In essence, Federal prosecution for misdemeanor crimes were relatively not pursued by the U.S. Attorney's department unless it was found that the issue was a *serious petty crime.* It is still common knowledge on this particular reservation, that a non Indian person can get away with a misdemeanor crime against an Indian person. Therefore, these acts of violence on Indian people go unpunished and it is more of an open season to assault Indians. The impact on the Reservation is one of disdain and nothing more than another broken promise by the Federal government.[47]

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46. CLINTON ET AL., *supra* note 8, at 330.

47. Letter from Bryce M. Wildcat, former Fort Peck Tribal Special Prosecutor (Nov. 17, 1998) (on file with author).

Although neither the government nor the tribes has compiled reliable statistical data,[48] such examples are credible evidence of the result of the federal government's failure to prosecute in this area. Thus, while the federal government has the exclusive power to prosecute these non-serious offenses, the fact that it has no obligation to do so has allowed it to neglect this power, leading to potential constitutional problems.[49] The following section addresses these problems.

III. CONSTITUTIONAL RIGHTS IMPLICATED BY THE PROBLEM

The foregoing discussion has reviewed the background of the jurisdictional problems presented by non-Indian on Indian crime committed in Indian country. The following section focuses on the constitutional rights implicated by this problem, beginning with Fifth Amendment due process.

A. DUE PROCESS

The Fifth Amendment states that "no person shall . . . be deprived of life, liberty, or property, without due process of law."[50] All persons have a liberty interest in going about their business without being victimized by others and in moving freely about in their daily endeavors without fear of being attacked or otherwise abused.[51] When the government fails to provide that degree of law and order necessary for ensuring these essential freedoms, it allows a deprivation of them without any process of law whatsoever.[52] This is especially true when the government establishes itself as the only vehicle for protecting such freedoms and prohibits all others from doing so.[53] In such case, the government's failure to provide the promised protection becomes the means by which the wrongdoers are allowed to operate, and the government is essentially an accessory to the wrongdoing. This is precisely the present state of affairs in regards to non-serious crimes committed by non-Indians against Indians on Indian land.[54] By establishing itself as the exclusive

48. *See, e.g., infra* notes 111-12 and accompanying text (quoting Department of Justice Memorandum (stating that there is a "pervasive 'lack of reliable crime statistics in Indian Country'")).

49. CLINTON ET AL., *supra* note 8, at 330.

50. U.S. CONST. amend V.

51. *See Oliphant*, 435 U.S. at 210 (stating that "from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested [a] great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty").

52. *Cf. id.* at 212 (stating that the Court was "not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians").

53. *See id.*

54. *See* Heisey, *supra* note 3, at 1055 (noting how the present system has encouraged "a

means by which such crimes are prosecuted, but then failing to honor this obligation, it is in fact the government that is responsible for the deprivation of these essential freedoms without any process of law.[55]

Similarly, property rights include the abilities to use and preserve one's property, as well as to exclude others from it.[56] Indian-Americans who are without sufficient law enforcement to prevent and deter crime no doubt are required to suffer various physical injuries to both real and personal property, as well as property common to their communities at large.[57] This directly interferes with their use of such property.[58] Further, the value of these properties is necessarily diminished by criminal activities directed against them.[59] Lastly, lack of meaningful law enforcement means that individual citizens and their communities do not get the benefit of the deterrent effect of effective law enforcement that would discourage the presence of criminal offenders in the first instance—offenders who are naturally lured to areas where law enforcement is known to be lax or non-existent.[60] Therefore, the failure of the United States government to honor its obligation to exercise exclusive jurisdiction over crimes committed by non-Indians against Indians in Indian country deprives Indian victims of due process by deprivation of both liberty and property interests.[61]

Moreover, when the federal government becomes aware that its policies are having a disproportionate detrimental effect on the rights of a particular class of persons, to persist in adhering to such policies without any rational basis for doing so is to injure such class knowingly, which is no less than intentional, or de jure,[62] discrimination.[63] This is particularly true when the consequences of the policies disadvantage

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fundamental lack of respect and even contempt for impotent tribal authorities").

55. *See generally* Clinton, *supra* note 12, at 523-24 (noting the federal government's exclusive jurisdiction over crimes by non-Indians occurring in Indian country).

56. *See* ROGER A. CUNNINGHAM ET AL., PROPERTY § 7.1 (1984) (listing "freedom from physical intrusion" as one of the rights incident to possession of land).

57. *See* Heisey, *supra* note 3, at 1055 (noting that "tribes [are] powerless to protect tribal property, interests, and members from the criminal conduct of non-Indians").

58. *Cf.* Swartz v. Scruton, 964 F.2d 607, 609 (7th Cir. 1992) (noting that "[a] substantive due process claim can be brought in the context of property interests").

59. *Cf.* Louisiana Pac. Corp. v. Beazer Materials & Servs., Inc., 842 F. Supp. 1243, 1251 (E.D. Cal. 1994) (stating that "[w]here there is a realistic threat of loss of property the mandates of the [due process] clause apply").

60. *See* Heisey, *supra* note 3, at 1055 (noting the "state of disarray in the current system").

61. *See* Heisey, *supra* note 3, at 1054 (noting the federal government's hesitancy to prosecute minor crimes committed by non-Indians on reservations).

62. "De jure" is defined as "[e]xisting by right or according to law." BLACK'S LAW DICTIONARY 437 (7th ed. 1999); *see also* Acha v. Beame, 438 F. Supp. 70, 79 (S.D.N.Y. 1977) ("De jure discrimination, in which a law or official policy expressly treats a class of persons in a less favorable manner, is, by its nature, intentional").

63. *Cf.* Washington v. Davis, 426 U.S. 229, 242 (1975) (stating that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another," but noting that disparate impact alone is not in and of itself sufficient to establish a constitutional violation).

only that class (here, the Indian-Americans). It is no defense that Congress did not intend for the separatist policies of § 1152 to work to the disadvantage of Indians; de jure discrimination will exist if, in applying a statute, federal prosecutors either create or perpetuate a discriminatory result.[64] As the Supreme Court indicated in the 1954 case of *Bolling v. Sharpe*,[65] "[D]iscrimination may be so unjustifiable as to be violative of due process."[66] Certainly, completely depriving a particular class of citizens of the ability to obtain justice from the courts for criminal offenses committed against them is not justifiable on any grounds.

B. EQUAL PROTECTION

Equal protection analysis is appropriate whenever similarly situated persons are treated differently.[67] As with other native-born Americans, Indian-Americans are citizens both of the United States and of the individual state where they reside.[68] National citizenship was bestowed on all Indians born in the United States by congressional act in 1924,[69] while the Fourteenth Amendment also makes Indian-Americans citizens of the states where they reside.[70] In terms of citizenship, therefore, Indian-Americans are situated similarly to all other citizens.[71] Consequently, the different treatment of criminal offenses committed on Indian lands involving Indian victims injured by non-Indian defendants is amenable to equal protection analysis.[72]

Equal protection analysis requires the strictest standard of review, known as strict scrutiny, when the class of affected persons is treated differently because of immutable characteristics such as race, alienage, national origin or gender, or when there is a fundamental right at issue.[73]

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64. Keyes v. School Dist., 413 U.S. 189, 208 (1973).

65. 347 U.S. 497 (1954).

66. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The Court noted that, while the Fifth Amendment contains no express equal protection clause, "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Id.*; *see also* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (stating that the Court's "approach to Fifth Amendment equal protection claims [has] been precisely the same as to equal protection claims under the Fourteenth Amendment").

67. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

68. *See* Jones, *supra* note 22, at 241 (describing the "unique legal status" of Indians as citizens of their tribe, state, and country).

69. 8 U.S.C. § 1401(b) (1994).

70. *See* U.S. CONST. amend. XIV, § 1.

71. *See generally* Nordlinger v. Hahn, 505 U.S. 1, 41 (1992) (Stevens, J., dissenting) ("Similarly situated neighbors have an equal right to share in the benefits of local government. It would obviously be unconstitutional to provide one with more or better fire or police protection than the other . . .").

72. *See generally Nordlinger*, 505 U.S. at 10 ("The Equal Protection Clause does not forbid classifications It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike").

73. In order to pass "strict scrutiny," a classification "must be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose." Palmore v.

Fundamental rights are "[t]hose which have their origin in the express terms of the Constitution or which are necessarily implied from those terms."[74] The Supreme Court has, in previous cases, indicated that separate classification of Indian-Americans does not constitute classification based on race, because such classification is based on tribal membership,[75] and that consequently, such classifications are subject only to rational basis review, a lower level of review.[76] However, this determination is disingenuous, given the fact that membership generally requires some threshold amount of Indian ancestry.[77] Indeed, § 1152 has been construed by commentators as reserving exclusive federal jurisdiction only in regards to interracial crime committed on Indian lands, not to interracial crime generally.[78] Strict scrutiny, therefore, is appropriate not only because the Indian liberty and property interests at stake are within the sphere of fundamental interests contemplated within the due process clause of the Fifth Amendment, but because Indian-Americans, as a race, are being subjected to treatment different from other citizens.

Moreover, as indicated above, at the point at which the federal government is aware that its policy of exclusive federal jurisdiction for non-Indian on Indian crime is particularly, if not exclusively, harmful to Indian-Americans, continued adherence to the policy is tantamount to intentional discrimination. As a general rule, when there is evidence that a discriminatory purpose has been a motivating factor in legislative or administrative action, judicial deference to such action on the basis of rational review is not appropriate.[79]

Even if, for purposes of equal protection analysis, classifications based on status as an Indian are evaluated according to rational basis review, such classifications fail, because they are an arbitrary means of affecting underlying governmental policy. The Supreme Court has indicated on various occasions that classifications based on status as an

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Sidoti, 466 U.S. 429, 432-33 (1984) (citations omitted).

74. BLACK'S LAW DICTIONARY 607 (5th ed. 1979).

75. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (noting the classification at issue to be "political rather than racial" and pointing out that "it operate[d] to exclude many individuals who are racially to be classified as 'Indians'"); *see also* United States v. Antelope, 430 U.S. 641, 646 (1977).

76. *See Morton*, 417 U.S. at 555 (stating that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed"); *see also* FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993) (stating that "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification").

77. CANBY, *supra* note 6, at 112.

78. *See, e.g.*, Clinton, *supra* note 12, at 526-27.

79. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977) (noting that "racial discrimination is not just another competing consideration" to be balanced by legislators or administrators).

"Indian" are intended to "help" Indians and are a consequence of "the solemn commitment of the Government toward the Indians."[80] However, the Court has also held that governmental activity at odds with announced governmental policy is per se irrational.[81] In regards to classifications based on status as being Indian, therefore, while the goals of such classifications may, at least ostensibly, have been intended to benefit Indians, the result of such classification is merely that many non-Indian criminals are never punished.[82] Consequently, such laws have, as indicated above, created a worse situation for Indian-Americans by leaving them largely unprotected from non-Indians who commit crimes on Indian lands. Thus, even if one assumes for the sake of discussion that such classifications might be facially valid as rationally related to a legitimate government interest, they are nonetheless violative of equal protection as applied, because they yield a result wholly at odds with the government objectives sought by such classifications.[83]

C. FIRST AMENDMENT

As indicated above, the Supreme Court has held on various occasions that classifications based on status as an Indian are not racial, because they are actually based on membership in a federally recognized tribe.[84] The Court has clarified this point by holding that because of this distinction, such classifications are "political rather than racial in nature."[85] Thus, classifications directed at Indians are in reality classifications directed at association in a political group.

In the 1976 case of *Elrod v. Burns*,[86] the Supreme Court stated that "political belief and association constitute the core of those activities protected by the First Amendment."[87] Elaborating upon this point, the Court stated:

> In *Perry* [*v. Sinderman*],[88] the Court broadly rejected the validity of limitations on First Amendment rights as a condition to the receipt of a governmental benefit, stating that the government "may not deny a benefit to a person on a basis that

80. *Morton*, 417 U.S. at 552-53.

81. *See, e.g.*, Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 337 (1989).

82. *See* Heisey, *supra* note 3, at 1054 (noting how "the federal court system is far too encumbered to prosecute the numerous minor crimes associated with life on the reservation").

83. *See* Yick Wo v. Hopkins, 118 U.S. 356, 372-74 (1886) ("[T]hough the law itself be fair on its face, . . . if it is applied and administered by public authority with an evil eye and an unequal hand, . . . the denial of equal justice is still within the prohibition of the Constitution").

84. *Morton*, 417 U.S. at 553 n.24.

85. *Id.*

86. 427 U.S. 347 (1976).

87. Elrod v. Burns, 427 U.S. 347, 356 (1976).

88. 408 U.S. 593 (1972).

> infringes his constitutionally protected interests—especially, his interests in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.[89]

The direct consequence of the federal government's failure to prosecute non-Indians who commit crimes against Indians, meaning persons who are members of a federally recognized tribe, is that they are denied the benefits of the criminal courts when victimized by non-Indians. Thus, they are being penalized for their membership in the tribe, a political organization. It is certainly foreseeable, if not probable, that certain members would even forfeit their tribal membership for purposes of avoiding such discrimination. At the least, those members who are actually affected by the policy of exclusive federal jurisdiction in this area are being discriminated against "solely because of [their] political beliefs."[90]

If any governmental scheme that invades the constitutional right to associate freely with particular political groups is to survive constitutional challenge, "it must further some vital government end that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights."[91] Application of § 1152, whereby members of a tribe are excluded from the criminal courts when victimized by non-members, furthers no vital government end and provides no benefit to the government except that the costs of prosecution are saved. Such a "benefit" hardly outweighs the loss of the affected tribal members, who are stripped, without any procedural safeguard whatsoever, of those liberty and property interests affected by crimes visited upon them by non-Indians.[92] Therefore, modification to the current system is required.

IV. MODIFICATION OF THE CURRENT APPROACH

The following section reviews several possible modifications to the current system intended to reduce the problem discussed above.

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89. *Elrod*, 427 U.S. at 359.

90. Branti v. Finkel, 445 U.S. 507, 510 (1980).

91. *Elrod*, 427 U.S. at 362-63.

92. *See* Heisey, *supra* note 3, at 1055 (discussing the problems associated with the powerlessness of tribal law enforcement over non-Indians).

A. LEGISLATIVE MODIFICATION

In the 1990 case of *Duro v. Reina,*[93] the Supreme Court held that tribes did not have criminal jurisdiction over non-member Indians. Congress responded by enacting legislation that immediately granted jurisdiction to the tribes "over all Indians."[94] In so doing, Congress clearly, albeit impliedly, expressed an intent to continue withholding tribal jurisdiction in criminal matters over non-Indians.[95] Nonetheless, Congress should be willing to give tribal courts jurisdiction over non-Indians if inequities resulting from the present system become sufficiently unpalatable. Moreover, Congress would no doubt arrive at some alternative to the current approach if faced with an order for injunctive relief, issued by a federal court in behalf of Indian-Americans, requiring the federal government to expend substantial sums for purposes of bringing the number of relevant prosecutions up to some acceptable quantity.

On the other hand, there are serious procedural shortcomings which weigh against tribal courts having jurisdiction over non-Indians. Take, for example, the previously noted case of *Oliphant v. Suquamish Indian Tribe,* in which the United States Supreme Court made clear that Indian tribal courts have no criminal jurisdiction over non-Indians.[96] In the course of its opinion, the Court indicated that tribal courts do not sufficiently guard rights considered fundamental under the constitutions of the United States and the several states.[97] As voluntary members of the separate tribes, Indians are free to make themselves amenable to tribal courts that disregard these rights, but the Court was not willing to allow tribal courts to subject persons who are not members of the tribe to the same treatment.[98] Quoting in part from the 1883 Supreme Court case *Ex parte Crow Dog,*[99] the Court stated:

> In *Ex parte Crow Dog* . . . the Court was faced with almost the inverse of the issue before us here—whether, prior to the passage of the Major Crimes Act, federal courts had jurisdiction to try Indians who had offended against fellow Indians

93. 495 U.S. 676 (1990).

94. *See* 25 U.S.C. § 1301(2) (1994); Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (1991); *see also* Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992) (describing the history of the legislative changes).

95. *See* L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 62 (1994) (noting the continuing inability of tribes to try and punish non-Indians).

96. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

97. *Id.* at 193-94.

98. *Id.* at 212.

99. 109 U.S. 556 (1883).

> on reservation land. In concluding that criminal jurisdiction was exclusively in the tribe, it found particular guidance in the 'nature and circumstances of the case.' The United States was seeking to extend United States 'law, by argument and inference only, . . . over aliens and strangers; over the members of a community separated by race [and] tradition, . . . [with] the restraints of an external and unknown code . . . ; which judges them by a standard made by others and not for them . . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . .' These considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the . . . contention that . . . [the separate tribes] retain the power to try non-Indians according to their own customs and procedure.[100]

In particular, the Court in *Oliphant* took note of the fact that "the Suquamish Tribe amended its Law and Order Code to provide that only Suquamish tribal members shall serve as jurors in tribal court."[101] Such a limitation is not only intuitively repugnant to notions of fairness; it is also inimical to the Sixth Amendment's requirement that juries be drawn only from a representative cross-section of the community where the crime has been committed in order to help ensure the ideal of an impartial jury.[102] This is particularly so when the excluded members make up a sizeable portion of the community. In *Oliphant* for example, there were 2,928 non-Indians, and only fifty tribal members, living on the reservation, and sixty-seven percent of reservation lands were owned in fee simple by non-Indians.[103]

Another illustration of tribal court practices that militate against entrusting tribal courts with the fate of non-Indians is when tribal court proceedings, either in whole or part, are conducted in a native language that a non-Indian party does not understand. One of the amicus curiae briefs filed in the 1997 Supreme Court case of *Strate v. A-1 Contractors*[104] makes this clear:

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100. *Oliphant*, 435 U.S. at 210-11 (stating that "the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty").

101. *Id.* at 194 n.4.

102. U.S. CONST. amend. VI.

103. *Oliphant*, 435 U.S. at 193 n.1.

104. 520 U.S. 438 (1997).

> [T]ribal court[s] can all too easily become a vehicle for the deprivation of the outsider's right to due process. This is not just an abstract fear. In 1995, BN was sued in tribal court on the Crow Reservation in Montana by the survivors of two members of the tribe killed in a railroad crossing accident on the reservation. Red Wolf v. Burlington Northern R.R., Civ. No. 94-31 (Crow Tribal Ct.). In 1996 the case was tried to a jury made up entirely of members of the tribe, including some who were relatives of the plaintiffs. During jury selection, many potential jurors expressed a deep-seated bias against the railroad. That bias was echoed by the court itself when a judge (who was not presiding over the case) addressed the venire panel in the Crow language, telling them 'A train runs through the middle of our land, Crows, you know, I don't have to tell you. Bodies, in the past, bodies are scattered along the railway. Now, this is the day.' Although the evidence showed that the driver and her mother were intoxicated at the time of the accident, the jury found BN 100% liable for wrongful death and awarded the five heirs what the jury described as 'compensatory' damages in the astonishing amount of $250 million.[105]

Such incidents no doubt go a long way towards convincing the average person, and probably the average lawmaker as well, that the prospect of giving tribal courts criminal jurisdiction over non-Indians should never become more than just a possibility.

An additional consideration that would cut against giving tribal courts jurisdiction over non-Indians pertains to the physical conditions to which inmates in tribal jails are exposed. The Supreme Court has made abundantly clear that constitutionally inadequate conditions of confinement may entitle injured prisoners to bring an action directly against the responsible government or government officials.[106] In the case of state prisoners, redress is sought either through habeas corpus proceedings, a civil rights action under 42 U.S.C. § 1983,[107] or on the

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105. Brief for the American Trucking Associations, Inc., the American Automobile Association, and Burlington Northern Railroad Company as Amici Curiae in Support of Respondents at 3, Strate v. A-1 Contractors, 520 U.S. 438 (1997) (No. 95-1872). "After the tribal court refused to stay enforcement of the judgment unless BN put up security for the entire amount, BN sought and obtained a federal court injunction against enforcement. Plaintiffs appealed to the 9th Circuit, where the case was argued in September 1996." Id. at 3 n.2 (quoting Burlington N. R.R. v. Estates of Red Wolf and Bull Tail, Nos. 96-35254 and 96-35265 (9th Cir. Sept. 1996)).

106. *See, e.g.*, Preiser v. Rodriguez, 411 U.S. 475, 497-98 (1973) (citations omitted) (discussing the availability of both habeas corpus proceedings and § 1983 actions to state prisoners).

107. *Id.*

basis of a due process claim under the Fourteenth Amendment.[108] In the case of federal prisoners, remedy is sought under either the Eighth Amendment[109] or the Due Process Clause of the Fifth Amendment.[110]

In an October 1997 Department of Justice memorandum to the Attorney General and Secretary of the Interior entitled *Report of the Executive Committee for Indian Country Law Enforcement Improvements*[111] the deplorable condition of tribal jails and detention facilities is discussed as part of the circumstances contributing to a law enforcement "crisis" in Indian Country. The report states in part:

> [Throughout Indian Country, t]here are 70 jails, including detention and holding facilities, located on 55 reservations. Most . . . are outdated, do not offer sufficient bed space for current needs, do not meet jail or building codes, and present a threat to the health and safety of inmates . . . . Many Indian Country jails house both adults and juveniles.
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> * * *
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> Resources for equipment and supplies are such that, in some jails, inmates receive no blankets or mattresses and no basic hygiene items, such as soap or toothpaste. Staff sometimes buy these basic items with their personal funds.
>
> * * *
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> Detention operations in most Indian Country jails fall far short of basic professional and BIA detention standards . . . . Operations are substandard in such critical areas as staff and inmate safety; inmate supervision and management; inmate services and programs; fire safety; hazardous substance control; sanitation and pest control; and preventive maintenance. The design of many of these old jails presents diverse health hazards, including an inability to isolate inmates with communicable diseases such as tuberculosis.
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> * * *
>
> [M]ost Indian Country jails have insufficient staff to perform all security, custody, and ancillary functions inherent to jail operations. If staff cannot supervise inmates, they also cannot prevent escapes, suicides, assaults, and vandalism.
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108. *See, e.g.*, Haines v. Kerner, 404 U.S. 519 (1972).

109. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825 (1994).

110. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979).

111. *Report of the Executive Committee for Indian Country Law Enforcement Improvements* (1997) <http://www.usdoj.gov/otj/icredact.htm> (last visited Dec. 3, 1999) [hereinafter *Executive Committee Report*].

> Deficient jail operations are accompanied by completely antiquated and inadequate jail structures, which contribute to high suicide rates. [footnote omitted] Most inmates in Indian Country jails are sentenced for misdemeanor offenses . . . .[112]

A fair interpretation of the Supreme Court's holding in *Oliphant v. Suquamish Indian Tribe*[113] is that non-Indian citizens of the United States do not "check their federally recognized rights at the door" upon entering Indian Country. Therefore, non-Indians incarcerated in tribal jails or detention facilities would retain the ability to bring actions directed to the conditions of their confinement. Certainly, conditions such as those identified in the above excerpts from the Department of Justice memorandum would provide a basis for such a claim.[114] Simply giving tribal courts jurisdiction over non-Indians thus has serious drawbacks.

B. PUBLIC LAW 280

Related to the issue of legislative modification is Public Law 280.[115] As modified by the Indian Civil Rights Act of 1968, Public Law 280 allows a state, with approval by the affected tribe, to assert its criminal jurisdiction over all crimes committed on Indian lands.[116] Generally, this approach has not proved workable.[117] States do not have the authority to tax Indians, and they are not willing to assume criminal jurisdiction over Indian lands if they cannot be reimbursed, through taxation of Indians, for the costs of doing so.[118] Further, the federal government cannot order the affected states to assume such jurisdiction.[119] The tribes have also been generally opposed to the proposal, both because they are not willing to pay taxes to a state to offset the state's ostensible "costs" of extending state criminal jurisdiction onto Indian lands and because states would be intruding upon their separate tribal sovereignty.[120] Therefore, Public Law 280 may also prove ineffectual.[121]

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112. *Id.*

113. *See generally* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

114. *See* Helling v. McKinney, 509 U.S. 25, 35 (1993) (recognizing an Eighth Amendment claim on the basis of prisoner's exposure to second-hand cigarette smoke).

115. Pub. L. No. 280, 67 Stat. 588 , 588 (1953).

116. *See* Clinton, *supra* note 12, at 548-49 (discussing Public Law 280).

117. *See generally* Jones, *supra* note 22, at 251 n.67 (describing Public Law 280 as "[t]he most conspicuous example of federal legislation vesting states and state courts with authority over Indian country"). *See also* Heisey, *supra* note 3, at 1056 (referring to Public Law 280 as "too draconian").

118. *See* Heisey, *supra* note 3, at 1054 (noting how states "are reluctant to allocate scarce state funds to enforce tribal laws on the reservation").

119. *See generally* New York v. United States, 505 U.S. 144 (1992).

120. *See* Clinton, *supra* note 12, at 549 (noting that "[n]o tribe has formally consented to the extension of state criminal jurisdiction over its lands").

121. *See generally* Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627 (1998) (arguing for reform of Public Law 280).

C. JUDICIAL MODIFICATION

The Supreme Court has itself indicated that any change to the status quo must come about only by Congressional action.[122] Thus, the Court would appear to be opposed to judicial invalidation of the current scheme even if procedural shortcomings in tribal court proceedings were remedied. This is not to say, however, that the Court would not be willing to do so if compelling arguments were made in support thereof particularly true. This may be if failure to invalidate the current scheme would result in Indian-Americans being continually left without judicial recourse available to other Americans, similar to the plight of slaves who, as the result of various state statutes, were also prohibited from participating in judicial proceedings. Moreover, if, as suggested above, a court would conclude that the consequences of applying § 1152 have resulted in de jure discrimination on the part of the federal government, the court would be authorized to order specific and reasonable equitable measures to be implemented by the federal government for purposes of remedying such discrimination.[123]

D. ADDITIONAL INVESTMENT IN PRESENT SYSTEM

One obvious alternative to either judicial or legislative action is for the federal government to invest more money and resources into the present system. The aforementioned October 1997 Department of Justice memorandum recommended precisely this option, at least for purposes of improving law enforcement.[124] After indicating that "[t]he single most glaring problem is a lack of adequate resources in Indian Country,"[125] the report goes on to present an alarming picture of increasing violent crime on reservations due to insufficient quality and quantity of protective law enforcement. Moreover, the report indicates that, if anything, the problem is actually worse than what available data indicate:

> There is broad consensus among law enforcement professionals and U.S. attorneys in Indian Country that the situation is serious and merits urgent attention. Indeed, there is a concern

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122. *See, e.g., Oliphant*, 435 U.S. at 211-12.

123. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (clarifying the broad authority of lower federal courts to implement equitable remedies for purposes of ensuring racial desegregation of public schools).

124. *See Executive Committee Report, supra* note 111.

125. *See Executive Committee Report, supra* note 111. For example, in 1996 only 32% of the Tribes submitted official crime reports to the BIA. Much information comes from informal surveys. *Executive Committee Report, supra* note 111.

> that available statistics understate the magnitude of the problem in many areas of Indian Country. A major finding of a recent DOJ Inspector General *Report on Criminal Justice in Indian Country* was that there is a pervasive 'lack of reliable crime statistics in Indian Country . . . .' Moreover, while law enforcement resources have been increased and deployed effectively throughout the United States, BIA resources actually have been reduced in Indian Country during the past few years.[126]

While the report focuses on the proliferation of violent crime, its findings are no doubt relevant to non-serious offenses as well. Thus, by improving law enforcement capability, the tribes should be better able to confront all classes of criminal activity. According to Phil Baridon, Senior Policy Analyst in the Criminal Division of the Department of Justice, because tribal law enforcement is doing all it can to confront violent crime, it is highly unlikely that non-serious offenses will be addressed to any appreciable degree; as a consequence, it is common practice that where non-serious crimes are committed by non-Indians against Indians on Indian lands, the perpetrators, who are not expected to be prosecuted by the federal government in the first place, are merely escorted off the reservation by tribal police, and no further action is taken.[127]

V. CONCLUSION

Current prohibitions against tribal courts exercising criminal jurisdiction over non-Indian defendants evolved from an era during which white supremacist ideology dictated that the separate tribes be prevented from establishing any political strength, and that Indians, who were not citizens, should not be entitled to the protections of the white man's courts. Such ideology supported federal and state legislative initiatives which politically, geographically, and racially segregated the Indian. These separatist policies presented no substantial jurisdictional problems when the tribes had no real court systems and the reservations were relatively distinct, isolated, and geographically removed. Within the tribes, traditional means of justice could be freely administered for the reason that such traditional means basically pertained only to the Indians themselves. Today, however, the boundaries of reservations are amorphous—geographically, culturally, and racially; and as society and technology evolve, these boundaries can only become less and less distinct. Consequently, continued segregation of the Indian, if it is maintained, will

126. *Executive Committee Report, supra* note 111.
127. Telephone conversation with Phil Baridon (Dec. 3, 1998).

necessarily imply more affirmative and deliberate conduct on the part of the federal government.

Likewise, the effects of segregation, such as in the case of "non-Indian on Indian" crime, have evolved into positive wrongs being worked on Indians; these too must now be justified. There is no justification, however, for depriving Indians—or anyone else—of the ability to seek redress for crimes inflicted on them, or for providing their malefactors a safe harbor from which to operate. Moreover, Indians, who are now full citizens of both the federal government as well as the states where they reside, are entitled to the same constitutional protections as are enjoyed by all other citizens. Consequently, Congress cannot disregard its duty to find a solution to the problems in this area merely because they are complicated; nor should the courts allow the constitutional rights of Indians to be further subdued either because it has been tradition to do so, because they historically had no such rights, or because it would be too expensive to enforce them. By reserving for itself exclusive jurisdictional authority, the federal government has chosen to make itself the sole means by which Indians may seek redress for certain crimes inflicted upon them. The federal government is obligated, therefore, to prosecute on behalf of the Indian to at least the same degree this protective government function is provided to other Americans.